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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-864

UNITED STATES OF AMERICA

v.

~~JOHN DOE~~

~~In Re: GRAND JURY SUBPOENA OF DANIEL DUFFY, et al.~~

DANIEL CAHALANE, *Petitioner.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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The Petitioner, Daniel Cahalane, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals entered in this proceeding on September 5, 1973.

OPINION BELOW.

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. The opinions of the District Court for the Eastern District of Pennsylvania, not yet reported, also appears in the appendix.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on September 5, 1973 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

1. May Petitioner, consistent with the self-incrimination clause of the Fifth Amendment, be compelled to incriminate himself under the laws of a foreign jurisdiction where there exists a substantial fear of foreign prosecution and where neither the Fifth Amendment nor 18 U. S. C. § 6002 affords him immunity from use against him in that jurisdiction of his grand jury testimony?

STATUTORY PROVISIONS INVOLVED.

18 U. S. C. § 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Added Pub. L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

§ 3504. Litigation concerning sources of evidence

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the

claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.
Added Pub. L. 91-452, Title VII, § 702(a), Oct. 15, 1970, 84 Stat. 935.

28 U. S. C. § 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such in-

formation. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal. Added Pub. L. 91-452, Title III, § 301(a), Oct. 15, 1970, 84 Stat. 932.

STATEMENT OF THE CASE.

Petitioner was served on May 3, 1973 with a subpoena to appear on May 9, 1973 before a federal grand jury. The subpoena did not list the statutes whose violations the grand jury was purportedly investigating. On May 8, 1973 Petitioner moved to quash the subpoena and to disclose illegal electronic surveillance of himself and his counsel. Petioner then subpoenaed the records of Bell Telephone Company of Pennsylvania on May 10, 1973. After a hearing on May 22, 1973 before Judge Higginbotham on said motions and Bell's motion to quash, the government submitted its form affidavit generally denying electronic surveillance of petitioner *"per se"* and made no representation at all about counsel. Petitioner took detailed exception to the affidavit in the Consolidated Memorandum filed on June 1, 1973. Those exceptions are set forth below. Without further hearing, Judge Higginbotham denied Petitioner's motions on June 5, 1973, granted Bell's motion to quash and directed appellant to appear before the grand jury. He did so on June 18, 1973 and declined to answer the questions propounded, on constitutional and statutory grounds. On June 19, 1973 the government served and filed an application for immunity and to compel testimony under 18 U. S. C. 6002 and the application was immediately heard by Judge J. William Ditter over Petitioner's objections that he had been denied due process as a result of the hasty convening of the hearing; that he feared prosecution based on his own testimony in England, Northern Ireland and the Republic of Ireland; that because he reasonably believed that his Fourth and Sixth Amendment rights had been abridged by illegal electronic surveillance; and that the immunity was not co-extensive with his Fifth Amendment right, since his

testimony could be used against him in a prosecution for alleged prior false statements to government agencies. Petitioner raised the further objection that he had just discovered that government affidavits in this and in another jurisdiction were blatantly inconsistent in their statements as to the ability of the F. B. I. to cause a search of its files on the basis of premises rather than names. Judge Higginbotham ordered certain wiretap documents impounded on June 27, 1973 after *in camera* inspection.

On July 12, 1973 Judges Ditter and Higginbotham filed a joint order mutually ratifying the orders of each other. And without further hearing, Judge Ditter granted use immunity to the Petitioner on June 13, 1973 and directed him to testify. At 10:25 A. M. on July 26, 1973. Petitioner again appeared before the grand jury and declined to testify for the reasons stated above.

At 11:15 A. M. on July 26, 1973, Petitioner was directed to appear immediately for a contempt hearing, said hearing being later postponed to 2:30 P. M. Petitioner objected to the timing of the contempt hearing because yet a third judge would be needed in the same grand jury proceeding, since Judge Ditter was unavailable for approximately five days; because co-counsel Louis M. Natali, Jr. could not be present; and because Petitioner had no time in which to prepare a defense to the charge. The government filed no rule to show cause and, of course, Petitioner was given no opportunity to answer.

At the contempt hearing on July 26, 1973, counsel for petitioner stated in open court that he had just been informed over the noon recess by Frank Durkan, Esq., counsel to the Irish Northern Aid Committee, that his examination of the overhearings belatedly admitted by the government and inspected *in camera* by the court in New York revealed that Mary Kennedy had been the subject of

surveillance. Counsel informed the Court (Judge Bechtle) therefore, at the 2:30 P. M. hearing that his client and he had both talked to Mary Kennedy over the tapped line and had probably been overheard and requested an *Alderman* hearing to determine the extent of the overhearings and their interference with Daniel Cahalane's Fourth and Sixth Amendment rights, as well as any statutory violations that might be involved. Over counsel's objections, the Court denied Petitioner the right to a hearing and forthwith held him in civil contempt and committed him to the custody of the United States Marshall for the life of the grand jury or until he testifies. The Court refused Petitioner request for a stay of the order or for bail.

Petitioner filed an application for stay of execution of judgment or bail pending appeal and a certified notice of appeal with the Court of Appeals on July 31, 1973.

On August 21, 1973, the Court of Appeals heard oral argument in this case and issued its judgment order on September 5, 1973 affirming the adjudication of contempt but remanding the case for a hearing on the sole question of the wiretapping of counsel. Pending said hearing, petitioner was admitted to bail in the amount of $15,000.00.

After three evidentiary hearings the District Court (Bechtle, J.), concluded that counsel were not the subject of government overhears and concluded that petitioner's refusal to comply with the Court's order was without just cause. Upon the Court's further inquiry, Mr. Cahalane indicated that he would still refuse to answer any questions and would petition this Court to review the order of the Circuit Court. Thereafter, on October 20, 1973, upon the Government's petition, filed in the Court of Appeals, the Court revoked petitioner's bail and committed him to prison until he complies with the request of the Grand Jury or until the expiration of the term of the Grand Jury.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With the Decision of Other Courts About a Unique Question of Law Specifically Reserved by This Court in *Zicarelli v. New Jersey State Commission of Investigation*, 406 U. S. 472 (1972).

A. The Danger of Petitioner Being Prosecuted in a Foreign Jurisdiction Is Substantial.

The questions propounded to Petitioner, before the grand jury were directed specifically to exportation of weapons to Ireland:

Mr. Merkle:

Q. Mr. Cahalane, on June 18, you were advised the grand jury had information that between January 14 and June 3, 1972, you personally ordered 160 guns from the Palace Fire Arms in Norristown, Pennsylvania. You were further advised that the grand jury was advised—the grand jury was advised—you signed for 119 of these weapons and paid over $20,000 which you ordered during this present period of time. I am going to ask you some questions with regard to that information.

No. 1, do you still have these weapons; and No. 2, did you purchase these weapons for an illegal purpose?

Q. Mr. Cahalane, for what purpose did you purchase so many weapons which cost so much money?

I assume you want to see your lawyer again before you respond? In that case, in order to save time, let me ask you another question and you can consult your counsel on both questions.

A. Repeat the first one again, please.

Q. Yes. The first question is, for what purpose did you purchase so many weapons which cost so much money, and the second question I would like to ask you is whether you purchased these weapons with your own funds or through funds furnished by some other individuals? Do you understand this question?

Q. Mr. Cahalane, if you did purchase these weapons with funds furnished by other individuals, will you please name those individuals to these ladies and gentlemen of the grand jury?

Q. Mr. Cahalane, two more questions here: Subsequent to your purchase of these weapons did you arrange or did you arrange for others to have them shipped from the state of Pennsylvania to any other state, the ultimate destination of the weapons being to Ireland?

Second Question: Will you name for these ladies and gentlemen of the grand jury any individuals to your knowledge who have engaged in the shipment of weapons from the state of Pennsylvania to another state or to Ireland?

Do you understand those questions?

Q. Mr. Cahalane, I am going to give you two final questions: First, have you ever transported weapons or explosives from Pennsylvania to another state or aided other individuals in so doing? Question No. 2: Have you ever discussed or planned with individuals the purchase of weapons in the state of Pennsylvania to be transported to another state?

Transcript, Hearing July 26, 1973, pp. 11-17.

The purport of all these questions is obviously gun smuggling to Northern[1] Ireland. British interest in such

1. The instant case arises from an investigation into alleged smuggling of firearms from the United States to the Irish Republican Army in Northern Ireland. This has been reported by several newspapers. *Cf. Hoffman v. United States,* 341 U. S. 479 (1951). On

prosecution has been demonstrated in the case of James O'Gara who has been indicted in the Southern District of New York for having allegedly conspired with one Frank Henry and one James Lagan to export guns out of the country (See Exhibit K). In the same indictment O'Gara is also charged with having purchased some of those guns by using the drivers' licenses of Daniel Crawford, Mathias Reilly and Paschal Morahan. The Irish Press in its issue of February 21, 1973, has reported the indictment and trial of the same Lagan and Henry before the Crown Court at Winchester, England, upon a charge of gun-running to Northern Ireland. It is thus perfectly apparent that there is an international as well as national aspect to these whole proceedings and the testimony of Appellant obviously is and will be of interest and in all likelihood would be available to the governments of England and Ireland and raises a threat of possible prosecution of Petitioner in either or both foreign jurisdictions.

Responsive answers to the propounded questions might tend to incriminate Mr. Cahalane under the laws of Great Britain, Northern Ireland, and Ireland, which punish smuggling, firearms violations, murder and conspiracy. The English Firearms Act of 1968, *Halsbery v. Statutes of*

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1. (Cont'd.)

May 8, 1973, the day after Petitioner was subpoenaed to appear before the grand jury, the *Philadelphia Evening Bulletin* reported:

> "A federal grand jury yesterday started investigating activities here in support of the revolutionary arm of the Irish Republican Army.
>
> Federal sources said the jury will attempt to determine what is being done with money solicited from IRA followers in the area.
>
> Sources said the investigation is trying to determine if any of the money is being used to buy and deliver guns to IRA members in Ireland.
>
> Federal investigators have discovered some guns found in Ireland have been purchased in this area, the sources said . . ."

England, 1 pps. 773-779 was the basis for the prosecution of Henry and Lagan in British Courts. In the Court of Appeals the Government conceded that Henry and Lagan, named as unindicted co-conspirators in the O'Gara indictment in the Southern District of New York, were successfully prosecuted in Great Britain for their role in the conspiracy which began in the United States.

Moreover the extant Extradition Treaty between the United States and Great Britain will allow that country to gain custody over appellant in order to bring him to trial.[2]

B. The Privilege Against Self-Incrimination Extends to Protection Against Incrimination Under the Laws of Foreign Jurisdictions.

In *Zicarelli v. New Jersey State Commission of Investigation,* 406 U. S. 472 (1972), jurisdiction was noted specifically to consider *inter alia,* the question presented here, i.e. whether the Fifth Amendment protects a witness in a jurisdiction in the United States from incrimination under the law of a foreign jurisdiction. (See Question 4 in limited notation of jurisdiction at 401 U. S. 933 (1971); see also 406 U. S. at 478.)[3] In deciding *Zicarelli,* however, the Court refrained from resolving this question because there did not appear on the facts of that case to be a real danger of incrimination under foreign law. 406 U. S. at 478-481. However, the following was carefully noted:

> Should the Commission inquire into matters which might incriminate him under foreign law and pose a substantial risk of foreign prosecution . . . then a *con-*

2. See Dawes-Simon Extradition Treaty of 1932, 47 Stat. 2122.

3. "Whether the immunity statute, N. J. S. A. 52:9M-17, can supplant the Fifth Amendment privilege when it fails to provide immunity against foreign prosecution, with respect to an individual who has a real fear of such foreign prosecution?" *Zicarelli v. New Jersey State Commission of Investigation,* 401 U. S. at 933.

stitutional question will be squarely presented. Id. at 481. (Emphasis added.)

In *Murphy v. Waterfront Commission*, 378 U. S. 52 (1964), the Supreme Court held that the constitutional privilege protects a witness not only against incrimination in the questioning jurisdiction but in other jurisdictions as well. *Murphy* involved the protection to be afforded a witness in another United States jurisdiction, but it is equally applicable to the protection of a witness in a foreign jurisdiction. Significantly, the *Murphy* court relied upon and quoted approvingly and at length from the decision in *United States v. McRae*, L. R. 3 Ch. App. 79 (1867) in which the English Court of Chancery held that where there exists a real danger of prosecution in a *foreign country*, the case could not be distinguished "in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of our own municipal law." 378 U. S. at 63 (quoting *McRae, supra* at 87). The policies behind the privilege are equally applicable whether incrimination occurs under laws in the United States or under laws of a foreign country. *Murphy* thus indicates that the privilege must protect against incrimination under the laws of a foreign jurisdiction.

The Court of Appeals found that petitioner had not established a "real and substantial threat" of foreign prosecution merely citing this Court's opinion in *Zicarelli*. See p. 3 of the Court's slip opinion. No other support or reason for the Court's holding is given. The Court of Appeals did not cite or otherwise indicate reliance on the District Court's opinion which held that the secrecy of the Grand Jury was ample to protect petitioner. See discussion of *United States v. Tierney, infra*, at p. 15.

Petitioner submits that the standard for invoking the threat of foreign prosecution is that (a) he reasonably fears

that a criminal charge might be brought against him in a foreign jurisdiction and (b) his answers to the questions asked by the grand jury would furnish a link in the chain of evidence needed in the foreign prosecution. Consider *Blau v. United States,* 340 U. S. 159, 161 (1950).

The government's statement of Petitioner's burden—apparently accepted by the Court of Appeals—is hyperbolic in requiring proof that (a) foreign jurisdictions stand ready to prosecute (Appellee's Brief, p. 21); (b) extradition is likely and a formal charge already lodged (pp. 21-22); (c) the foreign prosecution must be based on Petitioner's compelled testimony, which must be admissible in the foreign court (p. 23).

Because these standards have been argued in other courts by the government, Petitioner presented arguments which rose to that burden in its brief and stood ready to offer evidence at a plenary hearing had due process been accorded Petitioner before his commitment. However, it is submitted that the threat of foreign prosecution can be invoked in a case where the witness establishes the basis of a reasonable fear of such prosecution and demonstrates that his compelled testimony could constitute a link in the chain of evidence in the foreign prosecution (See Appendix Exhibit I). The testimony alone need not support a conviction under a criminal statute. *Blau v. United States, supra,* at 161.

The first element, namely reasonable fear, as opposed to a fanciful one or a "mere imaginary possibility," was set forth in *Blau,* discussed in *Murphy* and most recently applied in *In re Cardassi,* 351 F. Supp. 1080 (D. Conn. 1972) where the fear was found to be reasonable. The facts are not unlike those in the instant case, although the alleged smuggling there originated in Mexico, as opposed to here, terminating in Ireland.

Cardassi's fear was based on the questions asked her by the grand jury and their context, including a newspaper account of the purpose of the investigation, the kind of evidence, together with other subpoenaed persons and evidence, which appellant would have included in a hearing if given the opportunity to prepare his defense. The Supreme Court in *Zicarelli*, f.n. 16, commented on the contents of *Life* magazine articles without suggesting that such articles would be an inappropriate way of establishing the basis of a reasonable fear of foreign prosecution.

The fear in *Zicarelli* was remote and speculative, however, because the *Life* articles labelling Zicarelli the "foremost internationalist" made only passing reference to his holdings in Venezuela and the questions put to him by the grand jury alluded to no foreign country. "In what geographical area do you have Cosa Nostra responsibilities?" clearly referred to New Jersey, in the Court's opinion. *Id.* at 480. A truthful answer was deemed by the Court to preclude a foreign context. Petitioner's evidence, including the questions put by the grand jury, explicitly refer to shipping guns to Northern Ireland. And the trial for gun running of two Irishmen before the Crown Court ignited reasonable fear in appellant that the "Crown" was using more than press releases to deal with alleged gun smuggling to Ireland.

Secondly, *Zicarelli* explicitly adopts the "link in the chain of evidence" rule set forth in *Blau, supra,* in considering the question posed by the grand jury:

> "Nor is it even remotely likely that their answers could afford 'a link in the chain of evidence' needed to prosecute appellant in a foreign jurisdiction. Cf. Blau v. United States [citations omitted] . . . ." *Id.,* at f.n. 17, p. 480.

Just as in *In re Cardassi, supra,* the answers to questions about alleged criminal activity relating to a foreign country or jurisdiction could in this case provide a link in the chain of evidence that could be used against Daniel Cahalane in a prosecution for gun law violations and for English common law offenses such as kidnapping, mayhem, riot and other related offenses, as a principal or as an accessory.

Prior to this Court's noting of jurisdiction in *Zicarelli, supra,* the issue of foreign prosecution had been addressed and decided adversely to the witness in *In Re Parker,* 411 F. 2d 1067, 1069-1070 (10th Cir. 1969), vacated and remanded for dismissal as being moot, *Parker v. United States,* 397 U. S. 96 (1970). Subsequent to *Zicarelli,* the Fifth Circuit decided the question adversely to the witness there involved, see *In Re Tierney,* 465 F. 2d 806, 811-812 (5th Cir. 1972).

The Court in *Tierney* rested its judgment on the supposition that grand jury secrecy, as provided for in Rule 6(e) of the Federal Rules of Criminal Procedure, would provide a sure and complete substitute for judicial authority over foreign use of compelled testimony. This view was rejected, and properly so, in *In Re Cardassi,* 351 F. Supp. 1080 (D. Conn. 1972). While we would respectfully refer the Court to the full opinion in *Cardassi* as to other aspects of the issue, we commend in particular its analysis of grand jury "secrecy" and the implication of *Kastigar v. United States,* 406 U. S. 441 (1972) (upholding the constitutionality of "use" immunity):

> With deference this Court declines to follow the two courts of appeals which have found this argument persuasive. . . The argument rests on the assumption that all law enforcement officials with access to grand jury minutes can be relied upon to abide by the

disclosure requirements of Rule 6(e). While there is no reason to believe that any enforcement officials presently involved in this grand jury proceeding would not honor this rule, the constitutional protection of the witness must rest on more than faith. If in fact a law enforcement official wanted to make the witness's answers known to foreign prosecuting officials, it is unlikely that he would apply to this Court for disclosure of the grand jury minutes. He would simply send the transcript. It may well be that such conduct would render the official subject to the disciplinary powers of this Court if the conduct and the identity of the person responsible ever became known, but such an after-the-fact sanction would provide no protection for the witness.

The inability of American courts to use Rule 6 (e) as an effective protection for this witness against foreign use of her compelled testimony is highlighted by comparison with the ability the courts do have to enforce within this country the derivative use prohibition of 18 U. S. C. 6002. If a federal or state prosecuting official attempts to use evidence obtained directly or derivatively from a witness compelled to answer after receiving use immunity, the courts of this country have power to make sure that such evidence is excluded, or that any conviction thereby obtained is set aside. See *Kastigar v. United States,* 406 U. S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972); see also *Murphy v. Waterfront Commission,* 378 U. S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964). The prospect feared by the witness in such circumstances is within the ultimate control of federal and state trial courts with direct and collateral review available culminating in the Supreme Court. Such control can

be relied upon to provide "very substantial protection" against use of compelled testimony against a witness in domestic courts. *Kastigar v. United States, supra,* 406 U. S. at 461, 92 S. Ct. 1653; *but see id.* at 469 (dissenting opinion of Justice Marshall). The existence of this *judicial control* was what persuaded the Court in *Kastigar* that the self-incrimination privilege could be displaced by a grant of use immunity. *'A person accorded this immunity under 18 U. S. C. 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities.'* Id. at 460, 92 S. Ct. 1653, 1665. Rule 6(e) provides no similar protection, yet is the sole safeguard the Government can offer a witness who fears his compelled testimony may be used against him in foreign courts where the domestic judicial ban on use and derivative use of compelled testimony is unenforceable." 351 F. Supp. at 1082-1083 (Emphasis supplied).

The Court's reasoning in *Kastigar,* which was decided two years after *In Re Parker, supra,* and which rejects the governmental theory of good faith, would seem to be dispositive.

In addition to the practical disability to which *Kastigar* and *Cardassi* refer so far as governmental good faith is concerned, it is also clear that disclosure of grand jury testimony is in some instances mandatory, irrespective of good faith on the part of the government. Thus a witness' compelled grand jury testimony can be used as a basis for a perjury prosecution of him (and the trial court could not order an *in camera* proceeding without violating the alleged perjurer's right to a public trial). The Court in *Tierney* termed this "a speculative hypothesis," but more

than sixty years ago, the Supreme Court in a unanimous opinion, upheld precisely this contention. *Glickstein v. United States,* 222 U. S. 139 (1911). *Glickstein* not only established the government's right to use compelled testimony as the basis for a charge of perjury but emphasized the overriding need of the government to be able to conduct such prosecutions, in order to enforce the compulsory testimony legislation employed.

The court in *Tierney* also noted:

> "The same court which grants immunity is the court which prevents violation of the secrecy. The government represented that it could not violate the secrecy, even under the first sentence of [Rule 6(e)] allowing it to disclose matters in the performance of its duties, without a court order. That is answer enough to the contention of appellants that the government might disclose their testimony."

However, as a matter of fact grand jury testimony is regularly disclosed to criminal defendants without court order, pursuant to *Brady v. Maryland,* 373 U. S. 83 (1963) and *Jencks v. United States,* 353 U. S. 657 (1957). See also 18 U. S. C. 3500. Particularly when this disclosure is made in a proceeding out of the district where the witnesses testified, it is difficult to see how the court in the latter district could prevent disclosure.

There will be innumerable reasons for which disclosure of grand jury testimony is required even apart from the reasons discussed *supra.* Even where the government does not disclose without prior judicial authorization and where a court is aware of the imminent, required disclosure, it is highly questionable whether the court could protect witnesses by refusing to make their testimony available to other persons.

Pursuant to *Dennis v. United States,* 384 U. S. 855 (1966), disclosure of testimony may be obtained by a criminal defendant for use at trial. If Petitioner is called to testify at the trial of another, his grand jury testimony may be used for impeachment. Grand jury testimony may be the gravamen of a perjury charge against a witness. Under the Supreme Court's recent opinion in *Kastigar v. United States,* 406 U. S. 441 (1972), a witness who is subsequently prosecuted in the questioning jurisdiction would be entitled to disclosure in order to show use or derivative use of his grand jury testimony against him and to a hearing on that question. And under 18 U. S. C. § 3333 (1970), grand jury testimony may be made public by means of a "special report." For each of these reasons the secrecy of the grand jury may be pierced; protection of the witness is therefore dubious at best.

The secrecy of grand jury proceedings has been amply demonstrated in the very recent past to be a myth. The "secrecy" of the grand jury investigation into the Watergate scandal was effectively breached. Testimony therein, supposedly protected against revelation, became public knowledge almost as soon as it was adduced. The country found that it could get yesterday's secret grand jury testimony in today's papers by reading Jack Anderson. William Safire, a former Presidential advisor, in an article appearing in the New York Times on April 26, 1973 (Exhibit L), demonstrated that what in theory is "secret testimony" before a grand jury may become public knowledge at any time.

Congressman Mario Biaggi in New York City found that the shroud of "secrecy" around a federal grand jury proceeding is and can be made completely transparent. Biaggi, in his bid for the Democratic nomination for mayor of New York, ran afoul of stories "leaked" to the press that he "took the Fifth Amendment" when questioned by

a federal grand jury in 1971 (See New York Times, April 26, 1973).

In his testimony before the House Subcommittee on the Judiciary investigating the abuse of the grand jury process in Fort Worth, Texas, Mr. A. William Olson of the Internal Security Division flatly contradicted the position of the Government adopted theretofore in the related Fort Worth-Tierney proceedings—to wit, that the secrecy of the grand jury would protect a witness from foreign prosecution and that therefore there was no basis for the witness to fear foreign prosecution.

The following questions put to Mr. Olson and his answers clearly indicate a radical change in the Government's position since convening the Fort Worth Grand Jury in 1972, not only with respect to foreign prosecution but also with respect to the non-secrecy of "secret" grand jury matters:

> "Mr. Eilberg: Mr. Olson, is it possible that testimony given before a Federal District Grand Jury, notwithstanding its secrecy, could at some subsequent time be released by Order of the Judge?
>
> Mr. Olson: Yes, if the judge, upon application by the witness himself, many times in connection with subsequent criminal proceedings, orders the testimony released.
>
> Mr. Eilberg: So that a witness could have that concern, that the testimony he has given before a grand jury might at some future time be released by the judge?
>
> Mr. Olsen: Yes.
>
> Mr. Eilberg: It is also possible, is it not, that if a proceeding develops as a result of a grand jury investigation, that the testimony given by that witness be available and that the witness be available for further questions?

Mr. Olson: That is true. The witness could be called as a witness in trial and have to testify, and it might be necessary to use, for impeachment purposes, the grand jury testimony.

Mr. Eilberg: I know that the Fifth Circuit decided, and the Supreme Court agreed, that there was not substantial basis for foreign prosecution, but is it possible that a foreign prosecution might occur in the case involving the "Fort Worth Five"?

Mr. Olson: I can't rule that out, *No!* (Emphasis supplied.) pp. 69-70.[4]

Mr. Keating: ". . . are either of you Gentlemen aware of any situation where immunity has been granted where there has been a later prosecution by a foreign country?

Mr. Olson: I am not aware of any situation, but that does not mean there might not be . . ." p. 80.[4]

Finally, and most significantly, if petitioner's immunized testimony is given to the grand jury what is to prevent the Government from calling him to testify in the same manner at a public trial. It is inherent in the very grand jury process that petitioner's testimony would provide the basis for a prosecution. Once his testimony is given at trial subject to the same immunity, a prosecutor in a foreign jurisdiction need only send an observer or order a transcript to collect incriminatory evidence against the witness.

This Court is therefore urged to grant the writ of certiorari in order to clarify and resolve the important and recurring problem of the effect immunity has on a foreign prosecution.

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4. Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, March 13, 1973.

CONCLUSION.

For the reasons aforesaid, this Court is urged to grant the Writ of Certiorari. Clarification of conflicting opinions of lower courts on this recurring issue is essential to proper administration of justice.

Respectfully submitted,

LOUIS M. NATALI, JR.,
CHARLES A. GLACKIN,
Counsel for Petitioner.

Of Counsel:
SEGAL, APPEL & NATALI.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MISC. No. 73-93.

UNITED STATES

v.

JOHN DOE IN RE SUBPOENA OF
DANIEL CAHALANE

MEMORANDUM AND ORDER.

DITTER, *J.* July 13, 1973

In this case the government wishes to have immunity granted a witness so he can be compelled to testify before a grand jury. He opposes the application, asserting the immunity to be afforded will not protect him from prosecution based on his testimony.

On June 16, 1973, Daniel Cahalane appeared before a Federal grand jury sitting in the Eastern District of Pennsylvania. After being sworn, Cahalane refused to answer questions pertaining to the purchase of certain firearms in the United States contending that to do so might tend to incriminate him. Relying on the provisions of 18 U. S. C. 6002, the government now seeks an order which would require Cahalane to testify and which would grant him immunity from the use of that testimony in any criminal proceedings against him. He maintains the order should not be issued because it will not be effective.

Cahalane first asserts that he may be suspected of smuggling guns to the Irish Republican Army and therefore could be prosecuted in Ireland or Great Britain and that his testimony could be used against him in such proceedings. To support this position he cites *In re Cardassi*, 351 F. Supp. 1080 (D. C. Conn. 1972) in which it was held that a witness before a Federal grand jury sitting in Connecticut could not be asked about her illegal acts in Mexico. The difference between *Cardassi* and the case at bar is obvious —the questions propounded to Cahalane were about his activities in the United States, not about his activities in either Great Britain or Ireland. This distinction was noted in *Cardassi* when it was pointed out that if the questions before the grand jury were framed so as to relate solely to activities within the United States, no reasonable fear of incrimination under foreign law could exist (p. 1086).

There has been no indication of any pending prosecution against Cahalane in Great Britain or Ireland, and no statute or case of either has been cited to show that he might be answerable in either for his activities in the United States. It is almost universal that criminal laws have no extraterritorial effect, and therefore I conclude there is no real danger that answering the grand jury questions will tend to incriminate him under foreign law. See *Zicarelli v. New Jersey Commission of Investigation*, 406 U. S. 472, 92 S. Ct. 1670, 1676 (1972). See also *In re Tierney*, 465 F. 2d 806, 811-12 (5th Cir. 1972) and *In re Parker*, 411 F. 2d 1067, 1069-70 (10th Cir. 1969).

Cahalane's second argument concerns registration certificates required of him in connection with the purchases of guns he has made during the last three years. He alleges that the immunity statute will not protect him if he is charged with having given false statements on these forms and therefore immunity should not be granted. He bases

this assertion on the exception provision in the immunity statute, 18 U. S. C. 6002:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before it or ancillary to— .
>
> (1) a court or grand jury of the United States . . .
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, *except the prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.* (Emphasis added.)

To support his contention, Cahalane cites *In re Baldinger*, 356 F. Supp. 153, 164 (C. D. Cal. 1973), which holds that the exception from immunity in Section 6002 encompasses perjury or false statements previously made. I decline to follow that ruling. To me, the words used in the statute plainly indicate that the exception refers to future perjury, future false statements, or future failure to comply with the immunity order. If Congress intended the exception to apply to false statements previously given, it would have used the words, "giving or *having given* false statements".

More importantly, the *Baldinger* interpretation of Section 6002 amounts to saying that the statute is unconstitutional. Although the Fifth Amendment does not insulate against incrimination for future acts, it plainly protects a

person from being forced to incriminate himself with respect to crimes already committed. Therefore, if Section 6002 is interpreted to allow prosecution for past activities, —that is, *having given* false statements—it would improperly allow what the Constitution forbids.[1] It is elementary that statutes should be construed whenever possible to uphold their constitutionality: *United States v. Vuitch*, 402 U. S. 62, 70, 91 S. Ct. 1294, 1298 (1971).

Finally, the order that I am issuing with regard to immunity makes it plain that the exception does not apply to prior acts of perjury or false statements previously given. For these reasons, Cahalane's objections to being granted immunity must be overruled.

ORDER GRANTING IMMUNITY.

And Now, this 13th day of July, 1973, after hearing, the Court finds that (1) a duly constituted grand jury for the Eastern District of Pennsylvania is inquiring into matters involving violations of Federal statutes; (2) Daniel Cahalane appeared before the grand jury and was asked questions by the grand jury pertaining to this matter; (3) Daniel Cahalane refused to answer these questions on the grounds the answers might tend to incriminate him; (4) Daniel Cahalane is likely to continue to refuse to testify and provide information to the grand jury on the basis of his privilege against self-incrimination; (5) the testimony of Daniel Cahalane is in the judgment of the United States Attorney for the Eastern District of Pennsylvania, necessary to the public interest; (6) the Attorney General

1. If a grant-of-immunity statute is interpreted to allow any damaging use of compelled testimony, its constitutionality is jeopardized. However, the statute may properly permit prosecution for perjury committed in an otherwise immunized statement and also the introduction in evidence of so much of the statement as is essential to establish the *corpus delicti*: *United States v. Hockenberry*, 474 F. 2d 247, 249-50 (3rd Cir. 1973).

of the United States has approved the Application for Immunity; (7) the Application for grant of Immunity in accordance with Title 18, United States Code, Sections 6002-6003 should be allowed; and (8) Daniel Cahalane should be directed to answer the questions asked by the grand jury.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Application heretofore made by Robert E. J. Curran, United States Attorney for the Eastern District of Pennsylvania, to grant immunity to Daniel Cahalane in accordance with Title 18, United States Code, Sections 6002-6003 be and the same hereby is allowed. It is further ORDERED that Daniel Cahalane testify and answer the questions asked by the grand jury.

IT IS FURTHER ORDERED that no testimony or other information compelled under this order, or any information directly or indirectly derived from such testimony or other information, shall be used against Daniel Cahalane in any criminal case, except that the said Daniel Cahalane shall not be exempted by this order from prosecution for contempt committed while giving testimony as ordered herein, for future perjury, or for false statements hereafter made.

BY THE COURT:

J. WILLIAM DITTER, JR.,
United States District Judge.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 73-1660.

UNITED STATES OF AMERICA

v.

JOHN DOE
In Re: GRAND JURY SUBPOENA OF
DANIEL DUFFY, et al.

DANIEL CAHALANE,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Argued Monday, August 27, 1973
Before: SEITZ, ADAMS and ROSENN, *Circuit Judges.*

Henry E. Petersen
Asst. Attorney General
Robert E. J. Curran
United States Attorney
Robert L. Keuch
William M. Piatt
Attorneys
Department of Justice
Washington, D. C. 20530
Charles A. Glackin
Harrisburg, Pa. 17102
Louis M. Natali, Jr.
Philadelphia, Pa. 19102

JUDGMENT ORDER.

Appellant Daniel Cahalane was served on May 3, 1973 with a subpoena to appear before a grand jury in the Eastern District of Pennsylvania. He then filed a motion in that court to compel Government disclosure of electronic surveillance, to which the Government responded by denying that any such surveillance of the appellant had occurred. The district court ordered Cahalane to appear before the grand jury.

Before the grand jury, Cahalane invoked his Fifth Amendment privilege and refused to testify. On July 13, 1973, the district court granted to Cahalane testimonial "use" immunity under 18 U. S. C. § 6002, and redirected him to appear before the grand jury. Cahalane did so on July 26, 1973, and again refused to testify. He was then taken back before the district court, where a civil contempt hearing was held. In defense of his refusal to testify, Cahalane raised the contentions urged before us on this appeal. The district court found him in civil contempt, and ordered his imprisonment for the life of the grand jury or, alternatively, until he should decide to testify.

After careful consideration of the briefs and arguments of counsel in this case, we have determined to affirm the order of the district court holding the appellant, Daniel Cahalane, in contempt of court and remitting him to the custody of the United States Marshal. We do so for the reasons set forth below, and with the qualifications expressed in paragraphs 4 and 5 of this order.

(1) Appellant's contention that the "use" immunity conferred upon him does not protect him from prosecution for the making of false statements, in connection with prior statements pertaining to firearms, and therefore does not

adequately guard his Fifth Amendment privilege, is without merit. Testimony given before a grand jury after a grant of immunity under 18 U. S. C. § 6002 may be used only in a prosecution for falsehoods uttered in response to the command to testify. *See* U. S. v. Alter, No. 73-1121 (9th Cir., filed July 23, 1973), slip opinion at p. 19.

(2) Appellant has failed to show that his testimony before the grand jury will give rise to a "real and substantial" danger of foreign prosecution. *See* Zicarelli v. New Jersey State Comm'n of Investigation, 406 U. S. 472, 479 (1972).

(3) The affidavit submitted by the Government, denying electronic surveillance of the appellant, measures up to the standards enunciated in In re Horn, 458 F. 2d 468, 470-71 (3d Cir. 1972) and In re Grumbles, 453 F. 2d 119, 122 (3d Cir. 1971). Appellant's allegation that such surveillance transpired does not, therefore, justify his refusal to testify before the grand jury. In this connection, we think the district court did not abuse its discretion in granting the motion of the Bell Telephone Company to quash the subpoena by which appellant sought disclosure of Bell's records.

(4) Appellant's allegation that his counsel had been subjected to electronic surveillance, which allegation was made orally before the district court at the contempt hearing, would not ordinarily warrant more than a summary denial by the Government. *See* U. S. v. Alter, *supra,* at p. 13. However, in the circumstances of this case we feel an abundance of caution is imperative. Accordingly, we will retain jurisdiction with directions to the district court to allow appellant 5 days from the date of this order in which to prepare an affidavit concerning surveillance of his counsel, after the submission of which the Government shall

have an additional 5 days to check the pertinent records to determine if such surveillance was undertaken and to file an appropriate response. Following submission of affidavits by both appellant and the Government, the district court shall decide, within another 5 day period, and by reference to the guidelines established by *Horn, Grumbles,* and other cases, what further course is appropriate, preserving to the affected parties the right to seek further appropriate appellate review.

(5) We grant bail to appellant, pending the determination by the district court of the surveillance of counsel question, within the time limitations set forth in paragraph 4, bail to be in the amount of $15,000.

Chief Judge Seitz would vacate and remand for proceedings consistent with the relief provisions of the judgment order. Under his approach the application for release on bail would be moot.

By THE COURT,

ARLIN M. ADAMS,
Circuit Judge.

Attest:
THOMAS F. QUINN,
Thomas F. Quinn,
Clerk.

Dated: September 5, 1973.

COPY

Certified as a true copy and issued in lieu of a formal mandate on September 21, 1973.

Test: THOMAS E. QUINN,

Clerk, United States Court of Appeals for the Third Circuit.

COURT, U. S.
FILED
MAR 6 1974

No. 73-864

In the Supreme Court of the United States

OCTOBER TERM, 1973

DANIEL CAHALANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-864

DANIEL CAHALANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On July 26, 1973, petitioner appeared before a grand jury in the United States District Court for the Eastern District of Pennsylvania, pursuant to an order granting him testimonial immunity under 18 U.S.C. 6002. He refused to answer questions concerning his involvement in large-scale firearms purchases, and repeated his refusal when taken before the district court and again asked the questions. He was held in civil contempt and ordered confined for the life of the grand jury or until he purged himself of the contempt.

The term of the jury expired on February 22, 1974, and petitioner was released from custody the same day. The case is therefore moot. See, *e.g.*, *St. Pierre* v. *United States*, 319 U.S. 41; *Licata* v. *United States*, 429

F. 2d 1177 (C.A. 9), vacated, 400 U.S. 938; *In re Parker,* 411 F. 2d 1067 (C.A. 10), vacated, 397 U.S. 96.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.